89-1211

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

JOHN MARSHALL COGSWELL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI

TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review a decision dated October 4, 1989 of the Colorado Supreme Court which approved a decision of the Hearing Panel of the Colorado Supreme Court Grievance Committee which approved a decision of the Hearing Board of the Colorado Supreme Court Grievance Committee and, in support thereof, shows:

QUESTIONS PRESENTED FOR REVIEW

1. Does the Colorado Supreme Court's private censure of the petitioner for allegedly violating Disciplinary Rule 6-102(A) of the Colorado Code of Professional Responsibility violate petitioner's First Amendment right to freedom of association?

Disciplinary Rule 6-102(A) prohibits a lawyer from attempting "to exonerate himself from or limit his liability to his client for his personal malpractice." The petitioner's conduct consisted of making limited legal services available to members of the public under a contract which limited the petitioner's liability to claims brought within one year from the consultation and to the amount of $5,000 per consultation. The petitioner's limited legal services consisted of verbal consultation, lawyer referral and self help services performed by lawyers for the benefit of members of the public who voluntarily sought the services and who on the average paid $16.50 per consultation based upon a scheduled fee of $1.50 per minute of consultation time. Malpractice insurance was not available in the market for

this service when it was started in 1985 but became available by 1988 for $20,000 per year with a $100,000 deductible. Based upon petitioner's volume of business, this cost would have required a front end payment of $40 per client per consultation to defray the premium expense. Risk experience in Denver during the preceding ten years showed that 79% of all legal malpractice claims in the general practice were settled for less than $5,000 each. It was the petitioner's view that it was better for a member of the public to have the choice to see a lawyer who reasonably limited his liability than not to see a lawyer at all.

2. If the relationship between the petitioner and his client members of the public is protected by the First Amendment, did the Colorado Supreme Court wrongfully

censure the petitioner where the State offered no evidence whatsoever that Disciplinary Rule 6-102(A) prevented any public harm?

3. Did the Colorado Supreme Court's censure of the petition under the circumstances of this case violate the "principles of the Declaration of Independence" as guaranteed to the petitioner by federal law pursuant to Section 4 of the Enabling Act by which Colorado became a state?

4. Does the Colorado Supreme Court's judicial power under the Colorado Constitution empower it to enact Disciplinary Rule 6-102(A), which rule has very little to do with ethics and great deal to do with legislative policy and the police power? Colorado's judicial power is limited to

"practice and procedure" and cannot encroach on legislative power.

5. Did the Colorado Supreme Court's censure of the petitioner violate the petitioner's Fourteenth Amendment rights by taking his "life, liberty or property, without due process of law"? Canon 8 of the Code of Professional Responsibility states, "A lawyer should assist in improving the legal system." The petitioner resolved the conflict between Disciplinary Rule 6-102(A) and Canon 8 in favor of Canon 8 and against Disciplinary Rule 6-102(A). Yet, the Colorado Supreme Court arbitrarily decided this conflict in favor of Disciplinary Rule 6-102(A), did not address the issue and did not supply any reason whatsoever why, in case of conflict, the petitioner was bound to

Disciplinary Rule 6-102(A) rather than Canon 8.

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OPINIONS BELOW

Neither the decision of the Hearing Board nor the decision of the Hearing Panel nor the decision of the Colorado Supreme Court has been published. Copies are included in Appendix 1, Appendix 2 and Appendix 3, respectively.

JURISDICTION

The petitioner seeks review of the Findings of Fact and Recommendation of the Hearing Board dated October 4, 1988, entered in Original Proceeding in Discipline Before the Colorado Grievance Committee, Case No. GC87B-13, on October 4, 1988, as approved by the Hearing Panel of the Colorado Grievance Committee on November 19, 1988 and as further

approved by the Colorado Supreme Court on October 12, 1989.[1]

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The constitutional provisions, treatises, statutes, ordinances and regulations which this case involves are set forth below verbatim.

a. Constitution of the United States, Amendments.

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[1] Unless the context otherwise requires, general references herein to the collective action by the Hearing Board, Hearing Panel and Colorado Supreme Court against the petitioner (sometimes "Cogswell") are referred to as actions by the Colorado Supreme Court since the Colorado Grievance Committee is an agency created by such court whose members are appointed by such court. Rule 241.2 of the Colorado Rules of Civil Procedure.

ARTICLE I. Freedom of religion, speech and press - right of petition. Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

b. Constitution of the United States, Amendments.

ARTICLE XIV. Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

c. Colorado Enabling Act, Section 4, Chapter 139, 18 Stat. 474 (1875).

Constitutional convention - requirements of constitution. That the members of the convention thus elected shall meet at the capital of said territory, on a day to be fixed by said governor, chief justice, and United States

attorney, not more than sixty days subsequent to the day of election, which time of meeting shall be contained in the aforesaid proclamation mentioned in the third section of this act, and after organization, shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence; and, . . .

d. Colorado Constitution, Article III.

The powers of the government of this state are divided into three distinctive departments, -- the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

e. Colorado Constitution, Article VI, Section 1.

> **Vestment of judicial power.** The judicial powers of the state shall be vested in a supreme court . . .

f. Colorado Constitution, Article VI, Section 21.

> **Rule-making power.** The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, ...

g. Colorado Code of Professional Responsibility, Disciplinary Rule 6-102(A).

> (A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

h. Colorado Code of Professional Responsibility, Canon 8.

> A lawyer should assist in improving the legal system.

STATEMENT OF THE CASE

The petitioner ("Cogswell") commenced operations of The Legal Place on October 28, 1985.

The Legal Place, a sole proprietorship of Cogswell during all times relevant to these proceedings, is a low overhead, no conflict of interest, limited legal service organization. It was established by Cogswell in October, 1985 to make a profit in the legal business of satisfying the unmet legal needs of the consuming public. The business offers part time attorneys to members of the public for $1.50 per minute subject to their signing a client agreement which contains a provision limiting liability to $5,000 for claims brought within one year from the time of consultation. Clients who purchase forms are not required to sign a client agreement.

Clients who wish to see an attorney must sign the client agreement as a condition to receiving service.

The Legal Place offers limited service because lawyers at The Legal Place do not go to court, sign pleadings, type up contracts or do those other types of activities which require expensive support systems or continuing services. Such lawyers likewise cannot accept any cases on their own for full service in furtherance of The Legal Place's no conflict of interest policy.

Clients pay $1.50 per minute and control the time through the use of a time clock. When they enter the business, they are asked to view a video tape on which Cogswell explains how the system works and how they can use it most effectively.

The Legal Place lawyer first determines whether the client has a legal problem. If the client has a legal problem, the lawyer determines whether the client's problem can be resolved by self-help, limited service or full service. If the client's problem can be resolved by limited service, the attorney supplies the necessary advice. If the problem can be resolved by self-help, The Legal Place has forms available if necessary and the lawyer can assist in the completion of those forms. If the client needs a full service attorney, he is referred to a list of outside counsel. Materials are available to assist the client in finding such counsel.

Following the admonition of former Chief Justice Berger, Cogswell has trained his attorneys to be "healers," to minimize the adversarial process and to help people

organize their problems and show them how to resolve them expeditiously.

Cogswell started thinking of the business in 1978, being concerned about the high cost of legal services, the reluctance of people to use lawyers, the reported unmet need for legal services, the number of lawyers in the market place without jobs and associated institutional waste, the availability of part time lawyers, the Federal Trade Commission's study relating to trade names and other information acquired in his planning. Because of his concern over spurious suits, Cogswell elected to limit liability to $5,000 for claims brought within one year. Because of his concern that these actions would be seen as violating Disciplinary Rule 6-102(A) of the Code of Professional Responsibility, he carefully

studied that Code. Cogswell paid special note to the Preamble of the Code which states that "lawyers must with courage and foresight be able and ready to shape the body of the law to the ever changing relationships of society."

When he embarked upon his business of The Legal Place, Cogswell relied on Canon 8 of the Code and his view that one reason the bar was not making progress was because of these rules [limitation on liability and trade name rule], and that maybe the only way one could make progress was to take the position he has, namely that they are legislative rules, that they are unconstitutional as applied or that they are beyond the power of the Court or that they give way to Canon 8.

Cogswell decided the "Rule of Reason" had to apply to Disciplinary Rule 6-102(A). Based on historical data, he determined $5,000 was a reasonable amount and that the one year limitation was a reasonable limitation.

Cogswell selected the $5,000 amount in his limitation of liability clause based upon the statistic (confirmed by an independent Colorado legal insurance expert witness at the hearing) that 79% of all claims in the general practice of law settled for $5,000 or less and his view that, in a limited practice environment, the $5,000 amount would cover a higher percentage. Malpractice insurance is a real cost of legal services and has to be reflected in law firm economics. Cogswell was unable to obtain malpractice insurance when he opened The Legal Place but is now

able to obtain it for $20,000 per year which he estimated would cost each of his clients approximately $40 per consultation based upon current usage. Cogswell's average revenue per client consultation is approximately $16.50.

Cogswell's view was that each member of the public has the constitutional right to associate with a lawyer on reasonable terms and that what he has done in his client agreement is not so much to limit his liability as to see that members of the public can obtain lawyers at a favorable and reasonable price to give them more access to lawyers, more access to the law and therefore more access to justice.

At the hearing, Cogswell testified that people change, policy changes and rules change but ethics do not change. Cogswell

was concerned that legal ethics apparently depended not on what one was doing but on who one was since judges do not have liability, since the lawyers on the Hearing Board were immune and since public defenders are immune. He referred to an article in the National Law Journal entitled "Can Lawyers Place Limits on Liability?" which described certain limitations on liability that occur routinely and are accepted as part of the practice of law.

The public should have the right to acquire reasonable services without paying for the malpractice insurance costs if they want to. Cogswell put the limitation in bold print on the first page of the contract and put the contract terms on the back page to be up-front.[2] Nobody had refused his services

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[2] A copy of the client agreement is (footnote continued)

based upon the contract and his statistical data showed that 98% of those who had used his service had a favorable attitude toward it.

Prior to opening The Legal Place, he raised the issues in this proceeding by a letter dated October 23, 1985 to the Justices of the Colorado Supreme Court and others in which he said in part:

> I write this letter because the perception of the public is to judge new things by old rules. When this is done, my efforts immediately fall within the category of those legal clinics whose advertisements and behavior is frequently frowned upon and ridiculed by the legal professional.
>
> By informing you in advance of my activities at The Legal Place, I am appealing for an open mind as you view these activities. I am asking that you view my conduct, in

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(footnote continued from previous page)
attached as Exhibit A to Appendix 1.

possible violation of certain rules as discussed above, as good faith violations in furtherance of a position which is justified upon a proper balancing of Canon 8 with such rules.

On October 28, 1985, Cogswell also filed a petition with the Colorado Supreme Court to change certain rules contained in the Code of Professional Responsibility dealing with the issues raised in his October 23, 1985 letter. The proposed rules were published in the Colorado Lawyer and later denied by the Colorado Supreme Court on March 28, 1986.

The Grievance Committee initiated an investigation of the activities of Cogswell in early December, 1985 pursuant to Rule 241.10 of the Colorado Rules of Civil Procedure. On September 26, 1986, the Grievance Committee reported that its investigation showed Cogswell had violated two Disciplinary Rules, Disciplinary Rule 6-

102(A) relating to limitations on liability and Disciplinary Rule 2-102(B) relating to trade names. Cogswell exercised his right to reject an offer of discipline and to proceed with a formal complaint.

On January 16, 1987, Cogswell filed suit against the Justices of the Colorado Supreme Court and members of the Grievance Committee in the United States District Court for the District of Colorado to enjoin them from pursing the proceeding on various grounds including the ground that the proceeding violated his First Amendment rights. On January 20, 1987, the Grievance Committee served Cogswell with the formal complaint in this proceeding. On September 10, 1987, the United States District Court dismissed Cogswell's complaint on abstention grounds which dismissal was affirmed on appeal.

The Hearing Board of the Colorado Grievance Committee conducted a hearing in this matter on June 27 and 28, 1988. The Hearing Board issued its Findings of Fact and Recommendation of the Hearing Board on October 4, 1988. Appendix 1. The claim against Cogswell for violating the trade name rule by using the name "The Legal Place" was dismissed. Cogswell was adjudged guilty of violating the limitation on liability rule.

On October 31, 1988, Cogswell filed his Objections to Findings of Fact and Recommendations of the Hearing Board. On November 19, 1988, Hearing Panel "B" approved the Findings of Fact and Recommendation of the Hearing Board with two dissenting votes in favor of no discipline. Appendix 2. On December 23, 1988, the action taken by Hearing Panel "B" and other relevant papers

were filed with the Colorado Supreme Court. Briefs were filed. On October 4, 1989, the Colorado Supreme Court issued its decision approving the action of Hearing Panel "B," issued a private censure and ordered Cogswell to pay costs of $1,180.66. This petition was subsequently filed.

REASONS FOR GRANTING WRIT

1. **The voluntary association of an attorney and a client for the purpose of permitting the client to buy legal advice from the attorney is a right protected by the First Amendment.**

Colorado, acting through its judicial power in the adoption of ethical rules applicable to lawyers, cannot arbitrarily condition the association between a lawyer and his client on the absence of liability limitations in the contract between them. To do so violates the First Amendment rights of

both the lawyer and the client and burdens the association with an economic cost which both the lawyer and the client have a right to avoid.

The First Amendment constitutional implications of the attorney/client relationship begin with National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and end with Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). In United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), the Court, referring to Button and subsequent cases, stated:

> At issue is the basic right to group legal action, a right first asserted in this Court by association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our

> decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.

401 U.S. at 585.

The issue in this case is whether association between a private citizen and a lawyer which is initiated by the private person to obtain meaningful and economic access to the law is a fundamental right within the protection of the First Amendment.

A disciplinary rule forbidding a limitation of liability unreasonably increases the cost of providing legal services such that those who otherwise could afford them will go unrepresented. A consumer should be able to choose to limit his liability in order to keep down the cost of his legal advice.

In Ohralik, 436 U.S. at 457, this Court said:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. This does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny.

The petitioner's conduct has been condemned on the basis of Ohralik, supra, without any reason or discussion by the Colorado Supreme Court other than the following discussion of the Hearing Board found at page 14 of Appendix 1:

> Respondent argues that the above rule is unconstitutional because it deprives his potential clients and himself from exercising their constitutional right of freedom of association in order to obtain reasonable access to the law, justice and the courts. In the Board's view, Respondent's argument is refuted by Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). In that case a lawyer was

disciplined for having personally solicited contingent fee agreements from two young accident victims. The lawyer claimed that his conduct was protected under the First and Fourteenth Amendments. In rejecting that argument, this Court made it clear that lawyers cannot evade the reasonable regulation of their professional relationship with clients on the grounds that such regulation unconstitutionally impinges upon their own or their clients' rights to freely associate for lawful purposes. The Court said:

> "Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, 'employ[ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.' NAACP v. Button, 371 U.S. 415, 422, 83 S.Ct. 328, 343, 9 L.Ed.2d 405 (1963); see In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417. Nor can he compare his solicitations to the mutual assistance

> in asserting legal rights that was at issue United Transportation Union v. Michigan Bar, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 426 (1967); and Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964). 436 U.S. at 458-59, 98 S.Ct. at 1920."

The relationship between The Legal Place and its patrons is a business relationship, not a constitutionally protected exercise of associational freedom.

In Ohralik, supra, this Court declined to extend its collective activity rule to the activities of an ambulance chasing lawyer. But the Colorado Supreme Court has not understood the reasons for this Court's decision.

The Colorado Supreme Court's interpretation of Ohralik is fundamentally flawed. First, this Court has never held that the existence of a business relationship

defeats a claim of First Amendment protection. Second, in Ohralik, Ohralik did not contend that "his approaches to the two young women involved . . . an exercise of associational freedom." On the other hand, Cogswell does contend that clients who approach him for limited services and his availability to those approaches on the terms contained in his client agreement do involve the exercise of associational freedom. Lastly, the issue in Ohralik was "the entitlement of in-person solicitation of clients to the protection of the First Amendment. . ." This Court denied First Amendment protection to Ohralik whose conduct consisted, among other things, of going to the hospital, signing up a client but refusing to rescind the transaction when the

client later objected and engaging in other clearly egregious conduct.

The Hearing Board made no finding that Cogswell was engaged in in-person solicitation or that his conduct, viewed at a commercial level less lofty than the conduct of unions or the NAACP, somehow deprived him of the benefits of the First Amendment. The reasons for denying First Amendment protection to Ohralik had to do with the nature of in-person solicitation, i.e. its lack of visibility, its lack of public scrutiny and other policy factors. None of these factors pertains to Cogswell whose procedures are systemized, publicly disclosed and rigorously adhered to. There was no evidence or finding that Cogswell engaged in conduct creating a danger of "professionally reprehensible" conduct. [Button at 443-444.]

Cogswell's activities are decidedly different than those in Ohralik. There is no pressure whatsoever placed on a member of the public to use The Legal Place. This is a voluntary choice. Moreover, the member of the public is asked to view a video explaining how the service is utilized. He is free to leave at any time. The Legal Place lawyers are instructed to advise the client in advance of the consultation to terminate the consultation just as soon as the client has received what he came for. The average fee is about $16.50. There is only a genuine desire to give the consuming member of the public some legal consultation, however brief, to aid that client in vindicating, protecting or preserving any right he may have.

Cogswell's association with members of the public, in context with the plan of delivering legal services offered by The Legal Place, involves none of the constraints applicable to in-person solicitation. Cogswell should have the right to do individually what this Court says various associations are authorized to do collectively. Cogswell's services are visible, open to public scrutiny and there is nothing about them that is likely to result "in the adverse consequences the State seeks to avert."[3]

The contract utilized by Cogswell is simply a conditional form of advertising, as

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[3] The State does not know what these are as applied to the limitation on liability rule. It offered no evidence whatsoever of any adverse consequences the rule was intended to avoid. It offered no evidence of what would happen if there were no rule.

much as to say "these are the terms upon which our services are offered." Since there is nothing inherently misleading in this approach and since experience has not proved that this approach is subject to abuse, the Colorado Supreme Court through its professional rules may not impose restrictions. In Re RMJ, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982).

The Hearing Board concluded that "The relationship between The Legal Place and its patrons is a business relationship, not a constitutionally protected exercise of associational freedom." If the Hearing Board had found that the relationship was a "constitutionally protected exercise of associational freedom," the Hearing Board would have been required to conclude that the rule was unconstitutional as applied to

Cogswell because there was no evidence offered at the hearing that the rule was required to advance a substantial governmental interest. Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986).

It is clear that, where a substantial interest is required, the People must prove (1) the existence of the substantial interest, (2) that the regulation (which must be "narrowly drawn") directly advances that interest and (3) that the regulation is not more extensive than is necessary to serve that interest.

The importance of evidence proving the existence of a substantial interest cannot be underestimated. Thus, in NAACP v. Button, supra, the Court held that a plan of the NAACP under which attorneys were recommended

to members did not constitute improper solicitation stating in part:

> There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor.
>
> * * *
>
> We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. A fortiori, nothing in this record justifies the breath

> and vagueness of the Virginia Supreme Court of Appeals' decree. (Emphasis supplied.)

Button, 371 U.S. at 443-444.

In United Mine Workers v. Illinois State Bar, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), this Court once again was confronted with whether a plan of the union constituted the unauthorized practice of law where the union paid lawyers to represent its members who wished their services to prosecute workmen's compensation claims. The Court held that the union had a right under the First and Fourteenth Amendments, on the basis of the freedom of speech and assembly, to carry out the plan. This Court stated:

> The decree at issue here thus substantially impairs the association rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not

> one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the union and the attorney who represents its members.

United Mine, 389 U.S. at 225.

Since Cogswell's conduct is protected by the First Amendment and since the People offered no evidence to prove the limitation of liability rule advanced a substantial governmental interest, the Hearing Board was required to find that the rule was unconstitutional as applied to Cogswell.

The Colorado Supreme Court's refusal to deal with the constitutional implications of petitioner's conduct manifests an unwillingness to deal with one of the most serious issues facing the bar today - how to use a growing number of lawyers who want to help people but who cannot because their

efforts, if not channeled through the traditional practice of law as defined by rigid ethical rules, are deemed unethical and met with injunction and sanction.

The ethical rule which is the subject of this proceeding is one which has an undisputed effect on the cost of legal services. It is fundamental economics that the greater the cost of a service, the less the demand is. It is paradoxical that, as the cost of legal services rises, in part by increasing malpractice insurance costs, the number of laws and associated need for legal services also rises. This tension, exacerbated by rules such as the one prohibiting a limitation on liability, is compounded by the unwillingess of any judicial body in Colorado to confront the problem.

If this Court will not confront the issues raised in this proceeding, then arcane rules and judicial myopia will continue to repress the judicial innovation required for the bar to economically satisfy the increasing legal needs of the American public and honest, good minded lawyers who are bold enough to try will be branded as "unethical" and discouraged.

The Colorado Supreme Court has characterized the petitioner's actions as reflecting "a hubris which is uncharacteristic of a lawyer who has previously displayed an intense and undivided appreciation of the role of the judiciary in the legal system." Yet, one can as easily state that the petitioner's actions reflect the wisdom of any person who justifiably challenges traditions, the adherence to which

becomes arbitrary based upon the passage of time and changing circumstances. In short, the difference between hubris and wisdom is the hindsight of the ultimately prevailing point of view, a determination which should be made by this Court.

2. The principles of the Declaration of Independence justify challenges to tradition provided no public or private injury is involved.

In the Enabling Act by which Colorado became a state, the U.S. Congress protected citizens of Colorado not only from the exercise of power inconsistent with the U.S. Constitution, but from the exercise of power inconsistent with "the principles of the Declaration of Independence." It is important that this Court define and affirm the benefits of the Enabling Act to citizens like Cogswell who are trying to improve the

system and who are entitled to rely on fundamental, federally created rights.

Cogswell discerns that what has disturbed the Hearing Board most about his conduct is the way he chose to resolve the potential conflicts existing between his new business and prevailing ethical rules. For example, the Hearing Board's recommendation for sanctions is based on an implicit finding that Cogswell needs to reshape his "hubris." This finding is illustrated by two conclusions. The first is that Cogswell did not manifest the level of obedience to authority required of Colorado lawyers. This conclusion, unsupported by any ethical or other rule known to Cogswell, was not unexpected in view of a series of questions that Dr. Evans [Hearing Board Member] asked of Charles Goldberg [witness] at the hearing

to determine whether Cogswell found it difficult to accept authority and, later, of Cogswell as to whether he had good judgment. The second conclusion is that the Hearing Board was "troubled" by Cogswell's action in "directly and publicly challenging the jurisdiction and the rules of the Supreme Court of Colorado."[4]

Cogswell anticipated these conclusions at the hearing and reminded the Hearing Board that the principles of the Declaration of Independence, as much as the United States Constitution, were the supreme law in the State of Colorado. These principles invite honest, direct and public challenges to

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[4] Cogswell petitioned the Colorado Supreme Court to make this normally private and confidential proceeding a public proceeding. While the Colorado Supreme Court initially denied this petition, upon its own reflection, it later changed its mind.

authority in furtherance of the aims of society provided they are not accompanied by private or public injury.

Cogswell was raised to believe that the willingness to stand up and be heard on matters of importance, regardless of the consequences or other persons' contrary views, was a worthy American trait and that it was just this trait that motivated our forefathers to sign the Declaration of Independence and to create this free nation boldly, directly and publicly, in spite of associated risks. While the wisdom of our forefathers and the risks they took are frequently taken for granted, one cannot forget that progress consists in exploring the unknown. No one has a correct prescription for either proper change or the proper methods of change. Yet, to the extent

society discourages honest and open efforts for change of the kind involved here, it has abandoned progress as an objective and retreated to a sanctuary of habit and decline.

Cogswell understands the Preamble to the Colorado Code of Professional Responsibility to require the very traits which troubled the Hearing Board:

> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

In short, we have lived with the limitation of liability rule for so long

there is no evidence that, if it were repealed or modified by a rule of reason, it would cause any injury to the public whatsoever. The expected injury is only a thought in the minds of some. So far as Cogswell is concerned, he continues to believe that it is better for a member of the public to be able to see a lawyer who reasonably limits his liability than not to see a lawyer at all. His activities in furtherance of this belief were authorized by the principles of the Declaration of Independence.

3. The judicial power of the Colorado Supreme Court does not permit it to adopt legislative rules such as the rule involving limitations on liability.

The limitation on liability rule has nothing to do with ethics but a great deal to

do with police power. Yet, it was adopted by the Colorado Supreme Court through its exercise of a judicial power limited to "practice and procedure." Challenges to the exercise of this power will be predictably met with unreasoned brevity. As such, lawyers are particularly vulnerable in the area of controversies over rules such as exist in this proceeding since the Colorado Supreme Court is the judge of the constitutional validity of its own conduct. It is inherently unfair for this to occur and even more unfair when challenges, like Cogswell's, are made but dismissed without any reason whatsoever. For example, in this case, the Hearing Board, referring to Cogswell's challenge to the Colorado Supreme Court's power, said:

> The Board concludes otherwise, namely that the Court has ample power under the Colorado

> Constitution to adopt and enforce the two rules . . .

The Hearing Board relied on a case where the Colorado Supreme Court said it had authority "to promulgate rules governing the admission and regulation of lawyers."

Because of the inherent unfairness of allowing the Colorado Supreme Court to adopt and validate its own police power rules, this Court, to preserve due process under the Fourteenth Amendment, should insure that state judicial power is limited to practice (ethical considerations) and procedure (court rules) and find that nonethically based legislative rules are outside the judicial power of the Colorado Supreme Court.

The Colorado Supreme Court does not have the power to adopt Disciplinary Rule 6-102(A) which is a legislative rule beyond the power of the Supreme Court to adopt.

The Colorado Supreme Court does have the power to adopt ethical rules unique to relationships among lawyers, their clients, the courts and the public. Certainly, it has the power to insist upon high rectitude, competence and honest conduct from members of the bar. However, limiting one's liability is a business matter. It has nothing to do with ethics. The Colorado Supreme Court may be concerned that some client may improvidently limit his liability. It should handle this with requirements for full disclosure. Other concerns should be managed by the Legislature.

One of the difficulties here is that the Colorado Supreme Court has no evidence as to what would happen if the rule were abolished. All it can do is speculate, hardly a prudent method for determining public policy.

The importance of the scope of judicial power is highlighted in this case because Cogswell's argument that a Rule of Reason should be applied to the limitation rule was rejected solely because the Colorado Supreme Court had the "power" to adopt the rule.

The Hearing Board noted Cogswell's argument "that prohibiting reasonable limitations on malpractice liability impedes the delivery of legal services to those who need it most and can afford it least" and summarized some of the evidence offered on this issue.

The Hearing Board, "not unmoved by Cogswell's arguments," found against him on this issue because adoption of the rule "was clearly within the power of the court."

4. A lawyer's license to practice law should not be subject to his correct resolution of conflicting ethical rules.

The Colorado Supreme Court has the power to prevent the petitioner from practicing law solely because it disagrees with his resolution of conflicting ethical rules. This Court should not allow that to happen absent clearly defined standards which rationally guide a lawyer in making the tough choices that his profession entails.

On page 17 of Appendix 1, the Hearing Board stated "it is not the prerogative of an individual lawyer to ignore the rule in response to what the lawyer perceives is a higher duty under Canon 8 to assist in improving the legal system."

In like manner, the Hearing Board could as easily have taken the position that it was not the prerogative of an individual lawyer

to ignore Canon 8 in response to what that lawyer perceives is a higher duty under the disciplinary rule relating to limitations on liability.

In case of conflict, Canon 8 should prevail. There are only nine Canons and a substantially greater number of disciplinary rules. Also, it is noted in the Colorado Code of Professional Responsibility:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

In short, since the limitation of liability rule derives from the Canons, the Canons are a more appropriate benchmark to determine the

spirit of the law and the direction which it should take.

Since The Legal Place is a new concept for the delivery of legal services, any balancing of Canon 8 with the rule must take into consideration pertinent ethical considerations relating to improvement of the legal system.

There are no disciplinary rules under Canon 8 though three ethical considerations are instructive:

> EC 8-1 - Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system . . . . Thus, they [lawyers] should participate in proposing and supporting . . . programs to improve the system, without regard to the general interests or desires of clients or former clients.
>
> EC 8-3 - The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal

> problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. . . .
>
> EC 8-7 - Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. . . .

The argument of the Hearing Board that it is not Cogswell's prerogative to balance these rules is not sustainable. The Preamble to the ABA Model Rules of Professional Conduct states:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of

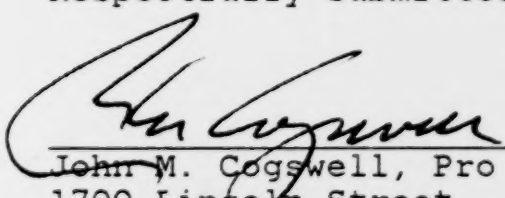
sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Colorado Supreme Court's "eenie meeni minie mo" approach is not consistent with the "sensitive professional and moral judgment" needed by lawyers wishing to make the system better for the next generation.

CONCLUSION

For the foregoing reasons, the petitioner urges the Court to grant the petition.

Respectfully submitted,



John M. Cogswell, Pro Se
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Telephone: (303) 861-2150

CERTIFICATE OF SERVICE

I hereby certify that I have this 26 day of January, 1990, mailed, by United States mail, postage prepaid, a true and correct copy of the foregoing to:

Linda Donnelly, Esq.
600 17th Street
Suite 510-South
Denver, CO 80202

James P. Hollaway, Esq.
600 17th Street
Suite 500-South
Denver, CO 80202

Kim Morss, Esq.
1301 Pennsylvania Street
Suite 300
Denver, CO 80203

Patricia S. Henderson

APPENDIX

No.	Description
1	Findings of Fact and Recommendation of the Hearing Board dated October 4, 1988 with Exhibit A attached being a copy of the client agreement
2	Action Taken by Hearing Panel "B" dated November 19, 1988
3	Opinion of the Supreme Court dated October 12, 1989

SUPREME COURT, STATE OF COLORADO

Case No. GC87B-13

ORIGINAL PROCEEDING IN DISCIPLINE
(Before the Grievance Committee)

FINDINGS OF FACT AND RECOMMENDATION OF THE HEARING BOARD

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

JOHN MARSHALL COGSWELL,

Respondent.

This matter was heard on June 27 and 28, 1988 before a Hearing Board (Board) composed of Hannah I. Evans, Ph.D., James V. Phelps, Esq. and James T. Moran, Esq., Presiding Officer. The Respondent represented himself.

The Complaint charged the Respondent with violations of the Code of Professional Responsibility, specifically DR2-102(B), engaging in private practice under a trade name, [But see ABA Model Rule 7.5(a)] and DR6-102(A), attempting to exonerate or limit one's liability for personal malpractice [ABA Model Rule 1.8(h)]. Since any act which violates a disciplinary rule also violates C.R.C.P. 241.6 and DR1-102(A)(1), Respondent was additionally charged with violating those rules.

The operative facts alleged in the Complaint were admitted in the Respondent's Answer. The Respondent defended on the grounds that: the Supreme Court lacks jurisdiction over the subject matter of the Complaint, the rules which he is accused of violating are unconstitutional, and those

rules conflict with, and must yield to, the overriding duty which is imposed upon him by Canon 8 to "assist in improving the legal system."

At the outset of the hearing, Respondent's Exhibits 1 through 18 and 19 through 26 were admitted by stipulation. Exhibits 27 and 28 were admitted into evidence during the hearing. Exhibits 11, 21 and 22 were admitted for the limited purpose of showing the Respondent's state of mind but not as evidence of the truth of the truth of the matters recited therein. Exhibit 19 was admitted over Complainant's objection that it is irrelevant. Exhibit 26 was later withdrawn from evidence pursuant to an oral stipulation of counsel approved by the Hearing Board. A post-hearing written stipulation concerning the legislative

history of certain language which appears in ABA Model Rule 1.8(h)' was, by order of the Hearing Board, received in substitution for an oral stipulation which counsel had previously made on the hearing record.

By order of the Court, entered on December 17, 1987, at the request of the Respondent, this grievance proceeding was made a public proceeding and all confidentiality barriers were removed.

The Respondent published notice of the time and place of the hearing and of the fact that it was open to the public. One or two interested members of the public attended most of the hearing sessions.

The People called the Respondent for examination as an adverse witness. The Respondent also gave direct testimony in his own defense. Additionally, the Respondent

submitted testimony from Sharon Oliver on the cost and availability of malpractice insurance, from Charles Goldberg, Esq. on Respondent's character and reputation, and from Robert Paul Weaver, Esq. on the statistical basis for the conclusions reached in the Federal Trade Commission's November 1984 Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, (Exhibit 11, Tab 9).

The Board examined the offices of The Legal Place at 1155 South Havana, Aurora, Colorado and some evidence was received at that location.

Both parties submitted comprehensive briefs which have been read and considered by the Hearing Board.

FINDINGS OF FACT

Based on the evidence presented, the Board finds that the following facts are established by clear and convincing evidence.

1. The Respondent, John M. Cogswell, was licensed to practice law in the State of Colorado on April 23, 1968 and is registered upon the official records of the Supreme Court of Colorado under Registration No. 2898. Mr. Cogswell is subject to the disciplinary jurisdiction of the Colorado Supreme Court and its Grievance Committee in these disciplinary proceedings. His contention that the Court is without power to adopt the two disciplinary rules he has been charged under is dealt with later in these findings, paragraph 15, infra.

2. Mr. Cogswell has practiced law in Colorado continuously since 1968. From 1964 to 1967 he served as an attorney in the United States Marine Corps. He is also a member of the bars of the State of Kansas and the District of Columbia.

3. Mr. Cogswell's reputation in the community for honesty and truthfulness is "sterling" and "unimpeachable." His reputation as a lawyer is equally good; he is noted for his creativity, resourcefulness, extreme tenacity, and an intense and undivided appreciation of the role of the judiciary in the legal system. Throughout his career, Mr. Cogswell has adhered to the highest ethical standards of the profession.

4. In 1978, troubled by the unavailability of legal services at affordable prices for ordinary people,

Mr. Cogswell began to develop an idea for delivering limited legal services to the public. He was motivated by a substantial number of speeches, articles and news items dealing with the unmet need for legal services, especially in lower income groups. Some of these speeches and articles are collected in Exhibit 11.

5. The concept developed by Mr. Cogswell is described by him as providing limited legal services in a low overhead, no conflict setting. Limited legal services include screening legal problems, facilitating referrals, prescribing self help with the use of appropriate forms and brochures, verbal advice and sometimes an appropriate phone call. Education on how to effectively use an attorney is also provided to the consumer to aid in reducing legal

costs. The limited services do not include signing pleadings or letters on behalf of a client, appearing in court or undertaking legal duties of a continuing nature, Exhibit 5. Mr. Cogswell believes that delivering limited services at a reasonable profit level is essential in order to increase the availability of such services. Voluntary and charitable legal services fall short of meeting the public need.

6. In 1983, Mr. Cogswell commissioned a market study by the Denver Consulting Group to assist him in evaluating, developing and implementing his legal advisory service. The consultant's Phase I report, dealing with the potential size of the market and refinements in the services to be offered appears in the record as Exhibit 2. Mr. Cogswell

interpreted the study as showing both a need and a strong market for the legal services he proposed to furnish.

7. On October 24, 1985, Mr. Cogswell opened his limited legal service organization under the name "The Legal Place" in the Market Square Shopping Center at 1155 South Havana, Aurora, Colorado. The Legal Place is a sole proprietorship owned by Mr. Cogswell. A sign in the reception room discloses that fact and Mr. Cogswell has filed an appropriate trade name affidavit in compliance with Colorado law.

8. Before a client sees an attorney at The Legal Place, the client signs a Client Agreement which, among other things, contains the following limitation on liability for malpractice:

LIMITATION OF POSSIBLE CLAIMS

I understand that my attorney is not required to have and may not have malpractice insurance coverage because such coverage is very expensive and, if obtained, would materially increase the charges of The Legal Place. For this reason, I agree that I have no claim against my attorney, J.D. Law, Inc. or The Legal Place for the advice I receive unless it is determined that my attorney has been negligent and unless I file a claim with the The Legal Place within one year from the date of the advice. I agree if I should ever make a claim against my attorney, J.D. Law, Inc. or The Legal Place, that the maximum damages I can recover will be $5,000.00. Should my claim go to court, the person who loses the case will pay the other person's attorney's fees. I agree that my claim, if it cannot be settled out of court, will be filed in a county court in the State of Colorado in the county where I received the advice complained of and such county court shall have exclusive jurisdiction over all claims and disputes between me and my attorney, J.D. Law, Inc. or The Legal Place.

A copy of the complete agreement, which is Exhibit 14 in the record, is attached to these findings as Exhibit A.

9. The Colorado corporation, J.D. Law, Inc., which is mentioned in the agreement, is a management company owned jointly by Mr. Cogswell and a non-lawyer. It is under contract with The Legal Place to manage the non-legal aspects of the practice, e.g. hire the receptionist, buy legal forms, etc.

10. The Client Agreement is not used for the prepaid legal services which The Legal Place furnishes under contract to certain companies.

11. On the day before he opened The Legal Place, Mr. Cogswell addressed a letter to the members of the Colorado Supreme Court, the Colorado Bar Association, the CBA Ethics Committee and "Other Persons Interested in

Legal Services to the Public," Exhibit 4. In his letter, Mr. Cogswell outlined the operation of the limited legal service organization which he envisioned. He also disclosed his awareness of "three ethical considerations which are paramount." ". . . the rule that a lawyer cannot split fees with a non-lawyer." (Not involved here). ". . . the rule that prohibits doing business with a trade name." and ". . . the rule that prohibits a lawyer from limiting his liability."

Mr. Cogswell advised his readers that he would comply with the rule against fee splitting but not with the other two rules which he believed to be illegal or unnecessary obstacles to his Canon 8 duty to improve the legal system and make services available where needed.

12. On October 28, 1985, a few days after he opened The Legal Place, Mr. Cogswell filed a petition to the Colorado Supreme Court praying for certain amendments to the Code of Professional Responsibility, including amendments which would authorize a limited legal service organization to practice under a trade name and place reasonable limitations on the malpractice liability of itself and its employed attorneys, Exhibit 5. On March 27, 1986, the Court rejected the proposed amendments to the Code of Professional Responsibility. See the Letter, dated March 28, 1986, from Chief Justice Joseph R. Quinn to Mr. A. Craig Fleishman, which appears as the last page in Exhibit 5.

13. Thereafter, the Court's Grievance Committee initiated an investigation which resulted in a letter of admonition to Mr. Cogswell dated September 26, 1986, Exhibits 7 and 8. Mr. Cogswell exercised his right under C.R.C.P. 241.7(5) to challenge the order of admonition; the same was vacated and these formal proceedings were initiated on January 16, 1987.

14. Concurrently with the initiation of formal grievance proceedings against him, Mr. Cogswell, on January 16, 1987, filed suit in the United States District Court for the District of Colorado against the justices of the Supreme Court of Colorado and the members of the Court's Grievance Committee, Exhibit 10. The federal court action has been stayed pending the outcome of these grievance proceedings.

DISCUSSION

15. The Respondent argues that, under the Colorado Constitution, the Supreme Court of Colorado lacks the power to adopt the disciplinary rules which regulate the use of trade names and prohibit attempts to limit malpractice liability. Respondent maintains that the Court has only those powers granted to it by the State Constitution; that Article VI limits the judicial power to rules governing the administration of courts and practice and procedure in civil and criminal cases; and that the rules in question, being legislative pronouncements of public policy rather than rules of either practice or procedure, are clearly beyond the power granted to the Judicial Department by the Constitution. The Board concludes otherwise, namely that the Court has ample power under

the Colorado Constitution to adopt and enforce the two rules, DR2-102(B) and DR6-102(A), challenged by the Respondent. In People v. Grimes, 654 P.2d 822, 823 (Colo. 1982), the Court said:

> Article VI of the Colorado Constitution grants the Colorado Supreme Court jurisdiction to regulate and control the practice of law in Colorado . . . . It is within our authority to promulgate rules governing the admission and regulation of lawyers . . . .

See, also, Conway-Bogue v. Bar Assn., 135 Colo. 398, 312 P.2d 998 (1957).

16. DR2-102(B) provides in part as follows:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a

> professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

Respondent asserts that the trade name rule violates his constitutional rights of free speech, privacy and equal protection. The argument for commercial free speech based on the lawyer advertising cases is persuasive. In Re RMT, 455 U.S. 191 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The Board concludes, however, that it need not reach the constitutional questions raised by Mr. Cogswell. The Board construes the term "trade name" as it is used in CR2-102(B) to mean words or phrases other

than lawyers' names which tend to mislead the public as to the identity of those practicing thereunder or the services rendered by the firm. The Board adopts the reasoning and the result reached by the Oregon Supreme Court in In Re Conduct of Shannon, 638 P.2d 482 (Or. 1982). In that case a private law practice was conducted under the name " Shannon and Johnson's Hollywood Law Center" or "Hollywood Law Center, A branch of Shannon & Johnson." After reviewing the disciplinary rule and Ethical Consideration 2-11, the Oregon Court reached the following conclusion:

> Thus, it appears that the purpose of DR2-102(B) in its reference to "trade names" is not to protect the lawyers who use such names, but to protect the public by prohibiting the use of names by lawyers which "would mislead laymen concerning the identity, responsibility and status" of those who use such names. A "trade name," as that phrase is

> used in DR2-102(B), is a word or phrase other than lawyers' names which tends to mislead the public as to the identity or services of a law firm. We find that the name "Shannon and Johnson's Hollywood Law Center," which was the "basic advertising" used by the Accused, has no such tendency. 638 P.2d at 484. (Emphasis supplied.)

No evidence was introduced to show that Mr. Cogswell's use of the name "The Legal Place" tends to mislead or deceive the public and the Board concludes that it does not. The Board's interpretation of Colorado's trade name rule moves it out of direct conflict with ABA Model Rule 7.5(a) and in the direction of harmony with the newer rule which provides that:

> A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable

legal services organization and is not otherwise in violation of Rule 7.1.

(Rule 7.1, mentioned above, prohibits a lawyer from making a false or misleading communication about himself or his services).

The Board's construction also avoids the mental strain of trying to rationalize why a firm name that includes the name of a deceased partner is a permissible trade name but "The Legal Place" is not. See the Comment to ABA Model Rule 7.5(a). The Board also notes the evolution of the phrase "Legal Clinic" from prohibited to permissible. Compare Matter of Oldtowne Legal Clinic, 400 A.2d 1111 (Md. 1079) with Jacoby v. State Bar, 562 P.2d 1326 (Cal. 1977) and Code of Professional Responsibility, Definitions (10).

The Board concludes that the Respondent has not violated DR2-102(b).

17. DR6-102(A) provides that:

> A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Respondent argues that the above rule is unconstitutional because it deprives his potential clients and himself from exercising their constitutional right of freedom of association in order to obtain reasonable access to the law, justice and the courts. In the Board's view, Respondent's argument is refuted by Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). In that case a lawyer was disciplined for having personally solicited contingent fee agreements from two young accident victims. The lawyer claimed that

his conduct was protected under the First and Fourteenth Amendments. In rejecting that argument, the Court also made it clear that lawyers cannot evade the reasonable regulation of their professional relationship with clients on the grounds that such regulation unconstitutionally impinges upon their own or their clients' rights to freely associate for lawful purposes. The Court said:

> Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, "employ[ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." NAACP v. Button, 371 U.S. 415, 422, 83 S.Ct. 328, 343, 9 L.Ed.2d 405 (1963); see In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417. Nor can he compare his solicitations to the mutual assistance in

> asserting legal rights that was at issue United Transportation Union v. Michigan Bar, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 426 (1967); and Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964). 436 U.S. at 458-59, 98 S.Ct. at 1920."

The relationship between The Legal Place and its patrons is a business relationship, not a constitutionally protected exercise of associational freedom.

18. Respondent also challenges DR6-102(A) as an illegal restraint of trade in violation of C.R.S. Section 6-4-101. The Board finds Respondent's argument to be without merit. The regulation of lawyers and law practice by a state supreme court and committees acting on its behalf does not constitute a combination or conspiracy in restrain of trade or commerce. Bates v. State Bar of Arizona, 433 U.S. 350,

360 (1977); Hoover v. Ronwin, 466 U.S. 558 (1984); Cf. People v. North Avenue Furniture and Appliance, 645 P.2d 129, 1295-96 (Colo. 1982).

19. Lawyers have a duty to the public and to society which requires them to observe the highest standards of professional conduct. C.R.C.P. 241A; Code of Professional Responsibility Preamble, Appendix to Chapters 18 to 20, C.R.C.P. Although exculpatory agreements which attempt to insulate a party from liability for his own negligence may be valid in other callings, Jones v. Dressel, 623 P.2d 370 (Colo. 1981), the Colorado Supreme Court, by adopting DR 6-102(A), has precluded the use of such agreements by lawyers. The Respondent argues that prohibiting reasonable limitations on malpractice liability impedes the delivery of

legal services to those who need it most and can afford it least. He submitted evidence on the lack of availability and the high cost of malpractice insurance. As stated in Exhibit 14, the Client Agreement, "such coverage is very expensive and, if obtained, would materially increase the charges of The Legal Place." Mr. Cogswell also points out that C.R.C.P. 265 affords some limitation on the liability of shareholders for the acts, errors and omissions of the employees of professional service corporations formed by lawyers for the practice of law. And he somewhat sardonically reminds us that relying on the personal net worth of a lawyer who practices without insurance is often a very real, practical and substantial limitation on that lawyer's liability to his client for personal malpractice. The Board is not

unmoved by Respondent's arguments, nor does it doubt his sincerity. Nevertheless, the adoption of DR6-102(A) was clearly within the powers of the Court. If the requirements of the rule in its present form are to be relaxed or modified, it is up to the Court to amend the rule. Conversely, it is not the prerogative of an individual lawyer to ignore the rule in response to what that lawyer perceives is a higher duty under Canon 8 to assist in improving the legal system.

CONCLUSIONS

20. The Respondent has not violated DR2-102(B).

21. The Respondent has violated DR6-102(A) which, in turn, forces the conclusion that he has thereby violated both DR1-102(A)(1) and C.R.C.P. 241.6(1).

RECOMMENDATION

22. The Respondent has no record of prior discipline.

23. The Board has reviewed the ABA Standards for Imposing Lawyer Sanctions (ABA Standards), in particular Section 6.2 and 7.0. The Board has also examined ABA Standards Section 9.0, Aggravation and Mitigation.

24. Mr. Cogswell is a mature lawyer of substantial experience in the practice of law. He knowingly violated a disciplinary rule. He did not do so for personal gain or for any dishonest or selfish motive. The Board believed Mr. Cogswell when he said that he was motivated primarily by a genuine desire to improve the legal system, specifically to increase the availability of affordable legal services. Nonetheless, the

Board was troubled by the manner in which Mr. Cogswell directly and publicly challenged the jurisdiction and the rules of the Supreme Court of Colorado. His actions reflect a hubris which is uncharacteristic of a lawyer who has previously displayed an intense and undivided appreciation of the role of the judiciary in the legal system. Offsetting the Board's concern to some degree is the fact that there was no evidence that the operation of The Legal Place has caused any actual or potential injury to a client, the public or the legal system.

25. Having considered the above factors, the Board recommends to the Colorado Supreme Court that the Respondent, John Marshall Cogswell, be publicly censured and assessed the costs of these disciplinary proceedings.

Dated this 4th day of October, 1988.

/s/
Hannah I. Evans

/s/
James V. Phelps

/s/
James T. Moran, Presiding Officer

EXHIBIT A

00 000 001

Client No. _____

To Be Filled Out By Client Only:

THE LEGAL PLACE
Client Agreement

_____

Client _____
(Print Name)

Telephone No. Business: _____ Residence: _____

_____

Address City State Zip Code

_____

IMPORTANT — READ CAREFULLY

I understand and have read the provisions of the Agreement as set forth below and on the other side of this Agreement.

LIMITATION ON POSSIBLE CLAIMS

I UNDERSTAND THAT MY ATTORNEY IS NOT REQUIRED TO HAVE AND MAY NOT HAVE MALPRACTICE INSURANCE COVERAGE BECAUSE SUCH COVERAGE IS VERY EXPENSIVE AND, IF OBTAINED, WOULD MATERIALLY INCREASE THE CHARGES OF THE LEGAL PLACE. FOR THIS REASON, I AGREE THAT I HAVE NO CLAIM AGAINST MY ATTORNEY, J.D. LAW., INC. OR THE LEGAL PLACE FOR THE ADVICE I RECEIVE UNLESS IT IS DETERMINED THAT MY ATTORNEY HAS BEEN NEGLIGENT AND UNLESS I FILE A CLAIM WITH THE LEGAL PLACE WITHIN ONE YEAR FROM THE DATE OF THE ADVICE. I AGREE IF I SHOULD EVER MAKE A CLAIM AGAINST MY ATTORNEY, J.D. LAW., INC. OR THE LEGAL PLACE, THAT THE MAXIMUM DAMAGES I CAN RECOVER WILL BE $5,000. SHOULD MY CLAIM GO TO COURT, THE PERSON WHO LOSES THE CASE WILL PAY THE OTHER PERSON'S ATTORNEY'S FEES. I AGREE THAT MY CLAIM, IF IT CANNOT BE SETTLED OUT OF COURT, WILL BE FILED IN A COUNTY COURT IN THE STATE OF COLORADO IN THE COUNTY WHERE I RECEIVED THE ADVICE COMPLAINED OF AND SUCH COUNTY COURT SHALL HAVE EXCLUSIVE JURISDICTION OVER ALL CLAIMS AND DISPUTES BETWEEN ME AND MY ATTORNEY, J.D. LAW, INC. OR THE LEGAL PLACE.

BASED ON THE ABOVE UNDERSTANDINGS, I promise to pay for the time I spend with my attorney at his posted rate by making payment to The Legal Place. This Agreement shall apply to all of my visits at The Legal Place unless changed in writing.

_____
Client's Signature

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IMPORTANT — READ CAREFULLY — SIGN ON FRONT

I UNDERSTAND THESE THINGS: (1) The lawyer I see is my limited legal service attorney; (2) The Legal Place is not my attorney and will not give advice; (3) Conversations between me and my attorney are confidential; (4) I will determine the amount of time I spend with my attorney and am free to terminate the conversation whenever I want; (5) I will tell my problem to my attorney as clearly, completely and concisely as possible and he will give me his advice on that problem; (6) Good legal advice depends upon my attorney's knowledge of not only the law but the facts; (7) And it may be impossible in the time I am willing to spend with my attorney for him to learn all the facts; (8) If my attorney does not receive all the facts, his advice may be inaccurate; (9) If my attorney recommends forms, I should have an attorney review the forms after I have filled them out; (10) If my attorney believes I need the assistance of a full service lawyer, he will refer me to a list of lawyers which I may use to select one; (11) My attorney may recommend the purchase and reading of certain educational materials.

I ALSO UNDERSTAND THESE THINGS: (12) My attorney is not providing me with general legal services but with a limited service which will necessarily limit the extent of his help; (13) My attorney, while acting in the capacity of a limited legal service attorney in association with The Legal Place, will not represent me in court nor will he represent me anywhere outside The Legal Place; (14) If my problem concerns someone else, it is possible that this other person may seek and obtain advice from a lawyer at The Legal Place; (15) If other persons accompany me when I see my attorney, the confidentiality (privacy) of our conversation may not be protected; (16) My attorney will not follow-up on my problem and will not consider any other matters for me after I leave The Legal Place because he will stop being my attorney when I leave The Legal Place; (17) Each time I visit any lawyer at The Legal Place I will begin an all-new attorney/client relationship under this Agreement; (18) While there is an appointment procedure, there is no assurance that I will be able to see the same attorney on a future visit to The Legal Place; (19) I desire to see an attorney because I believe it would be helpful for me to talk to an attorney regardless of the limitations created by this limited relationship.

SUPREME COURT, STATE OF COLORADO

Case No. GC87B-13

ORIGINAL PROCEEDING IN DISCIPLINE
(Before the Grievance Committee)

ACTION TAKEN BY HEARING PANEL"B"

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

JOHN MARSHALL COGSWELL,

Respondent.

On November 19, 1988, Hearing Panel "B" considered the Findings of Fact and Recommendation of the Hearing Board and the Objections filed by the Respondent. The Panel approved the Findings of Fact and Recommendation of the Hearing Board. The Panel, therefore, recommends that the Respondent be publicly censured and assessed

the costs of these disciplinary proceedings. Kathy P. Bonham and Elissa S. Guralnick, Ph.D., dissented in favor of no discipline despite a technical breach of DR6-102(A) by the respondent.

Dated at Denver, Colorado, this 19th day of November, 1988.

dissented KATHY P. BONHAM	absent JEFFREY A. CHASE
/s/ DAVID J. CORDOVA	dissented ELISSA S. GURALNICK, Ph.D.
/s/ LAWRENCE A. HECOX	/s/ ANTOINETTE HELFRICH, Ph.D.
/s/ MICHAEL E. McLACHLAN	/s/ ARTHUR S. NIETO
/s/ TERRANCE R. KELLY, VICE CHAIRMAN	

SUPREME COURT OF COLORADO
State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

(303) 861-7330

JOSEPH R. QUINN
Chief Justice

October 12, 1989

John Marshall Cogswell
Attorney at Law
1700 Lincoln Street, Suite 3500
Denver, Colorado 80203

Re: People v. Cogswell, No. 88SA474

Dear Mr. Cogswell:

The Supreme Court has received the Findings of Fact and Recommendation of the Hearing Board of the Supreme Court Grievance Committee. The Hearing Panel of the Grievance Committee approved the Findings of Fact and Recommendation, and concluded that you should be publicly censured for your

unprofessional conduct. The Supreme Court approves the Findings of Fact of the Hearing Board, but has concluded that you should be sanctioned by the imposition of a private censure, and not a public censure, and that you should be assessed the costs incurred in this disciplinary proceedings. One member of the Court supports a more severe sanction. The Findings of Fact and Recommendation of the Grievance Committee is attached to this private censure.

The Hearing Board concluded that you violated DR6-102(A) (a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal

malpractice) and C.R.C.P. 241.6(1) in providing legal services and advice at the "Legal Place."

You did not have a dishonest or selfish motive and your intention was to improve the legal system by making legal services available at a reduced cost, but you elected to violate a disciplinary rule in an attempt to carry out your plan. You are a mature lawyer with substantial experience and an excellent reputation at the bar. You have no previous disciplinary record. Your actions violated the rules of this court.

Accordingly, you are privately censured by the Supreme Court of Colorado for your unprofessional conduct in maintaining and

practicing law as the "Legal Place" with an agreement that limited responsibility for malpractice. You are directed to pay the costs of these proceedings in the amount of $1,180.66 by tendering that sum to the Grievance Committee, 600 17th Street, Suite 500-S, Denver, Colorado, 80202-5435, within thirty days of the date of this private censure. This private censure will not be made public, but will be placed in your file. If you should again violate the Code of Professional Responsibility, this private censure may be considered by the court and could result in the imposition of a more serious sanction than the new violation might otherwise warrant.

THE COURT, EN BANC, JUSTICE LOHR not participating.

By/s/
Joseph R. Quinn,
Chief Justice

Encl.

cc: James P. Hollaway, Committee Counsel
Linda Donnelly, Disciplinary Counsel